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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 463

STEWART L. UDALL, SECRETARY OF THE INTERIOR, PETITIONER

v.

FEDERAL POWER COMMISSION, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR STEWART L. UDALL, SECRETARY OF THE INTERIOR

OPINIONS BELOW

The opinion of the court of appeals (IV R. 373–387) [1] is reported at 358 F. 2d 840. The opinion and order of the Federal Power Commission (R. 609–717) are reported at 31 F.P.C. 247; its opinion and order on rehearing (R. 780–805) are reported at 31 F.P.C. 1051.

JURISDICTION

The judgment of the court of appeals was entered on March 24, 1966 (IV R. 389). On June 21, 1966,

[1] "R." references are to the joint appendix in the court below (volumes I–III of the record in this Court). "IV R." references are to volume IV of the record in this Court.

the Chief Justice extended the time for filing a petition for a writ of certiorari to and including August 21, 1966 (IV R. 391). The petition for a writ of certiorari was filed on August 19, 1966, and granted on November 7, 1966 (IV R. 393; 385 U.S. 927). We invoke the jurisdiction of this Court under 28 U.S.C. 1254(1) and Section 313(b) of the Federal Power Act, 16 U.S.C. 825(*l*).

STATUTE INVOLVED

The Federal Power Act of June 10, 1920, 41 Stat. 1063, as amended, 16 U.S.C. 791a *et seq.*, provides in pertinent part:

Section 4 (16 U.S.C. 797):

> The Commission is authorized and empowered—
>
> (a) To make investigations and to collect and record data concerning the utilization of the water resources of any region to be developed, the water-power industry and its relation to other industries and to interstate or foreign commerce, and concerning the location, capacity, development costs, and relation to markets of power sites, and whether the power from Government dams can be advantageously used by the United States for its public purposes, and what is a fair value of such power, to the extent the commission may deem necessary or useful for the purposes of this chapter.
>
> * * * * * * *
>
> (e) To issue licenses to citizens of the United States, or to any association of such citizens, or to any corporation organized under the laws of the United States or any State thereof, or to any State or municipality for the purpose

of constructing, operating, and maintaining dams, water conduits, reservoirs, power houses, transmission lines, or other project works necessary or convenient for the development and improvement of navigation and for the development, transmission, and utilization of power across, along, from, or in any of the streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, or upon any part of the public lands and reservations of the United States (including the Territories), or for the purpose of utilizing the surplus water or water power from any Government dam, except as herein provided: * * *

* * * * *

Section 7(b) (16 U.S.C. 800(b)):

Whenever, in the judgment of the Commission, the development of any water resources for public purposes should be undertaken by the United States itself, the Commission shall not approve any application for any project affecting such development, but shall cause to be made such examinations, surveys, reports, plans, and estimates of the cost of the proposed development as it may find necessary and shall submit its findings to Congress with such recommendations as it may find appropriate concerning such development.

Section 10 (16 U.S.C. 803):

All licenses issued under sections * * * 795–818 * * * of this title shall be on the following conditions:

(a) That the project adopted, including the maps, plans, and specifications, shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development, and for other beneficial public uses, including recreational purposes; and if necessary in order to secure such plan the Commission shall have authority to require the modification of any project and of the plans and specifications of the projects works before approval.

* * * * *

QUESTION PRESENTED

The Federal Power Commission is directed by Section 7(b) of the Federal Power Act not to issue any license for a hydroelectric project to exploit water resources that, in its judgment, should be developed for public purposes by the United States. The question presented is whether the Commission failed in this case to require, before it issued a license, a showing that licensing was a suitable alternative to federal development of the resource involved.

STATEMENT

Pursuant to Section 4(e) of the Federal Power Act (p. 2, *supra*), Pacific Northwest Power Company (a joint venture of four private power companies) on March 31, 1958, applied to the Federal Power Commission for a license to construct a major hydroelectric power project at High Mountain Sheep (R. 165, 443-444, 609-610). That site is on a navigable

reach of the Snake River (a tributary of the Columbia River) on the border of Oregon and Idaho, a mile upstream from the confluence of the Snake with the Salmon River (R. 443, 445, 525, 609; see map following Pet. 41). The proposed dam would be 670 feet high and create a reservoir about 58 miles long with a usable storage capacity of 2,250,000 acre-feet, and would cost an estimated $190,652,000 (R. 445, 447, 620). The project works would be located on, and the reservoir would inundate, lands of the United States (R. 443, 671).

On March 15, 1960, Washington Public Power Supply System, an association of public utility districts of the State of Washington, filed an application for a license to construct a similar project at the Nez Perce site three miles downstream on the Snake River from High Mountain Sheep and slightly below the confluence of the Snake with the Salmon River (R. 247, 251, 443–444, 609). Since the sites are mutually exclusive the applications were consolidated for hearing (R. 258).

Before the hearing began the Commission solicited the views of the Secretary of the Interior (R. 236, 256, 277). This is standard procedure in a license case, reflecting the Secretary's broad responsibilities pertaining to water resources development, conservation, water pollution control, reclamation and wildlife protection—all potentially affected by a major water storage and hydroelectric project. Numerous such projects in the Pacific Northwest have been constructed by the Interior Department's Bureau of Rec-

lamation, and the Department's Bonneville Power Administration, which markets all power produced by federal projects in the region (including the eight hydroelectric dams downstream from High Mountain Sheep on the Snake-Columbia waterway), is the region's largest power supplier (R. 498, 501, 731–732). Initially, in letters dated November 21, 1960, and March 15, 1961, the Secretary urged postponement of the licensing of either project while means of protecting the salmon and other fisheries were studied (R. 126, 138). He suggested that the imminence of a treaty with Canada and of other new power sources made delay tolerable. Then on June 28, 1962—after the record before the hearing examiner was closed but before the examiner rendered his decision—the Secretary wrote the Commission unequivocally urging it to recommend federal construction of High Mountain Sheep to Congress, pursuant to Section 7(b) of the Federal Power Act (p. 3, *supra*), on the ground of the great impact that this major water storage project would have on the varied and predominantly federal interests involved in the development of this area of the Snake River (R. 309). The Commission ordered the record of the licensing proceeding reopened for the sole purpose of incorporating the Secretary's letter, and invited the parties to file supplemental briefs in response thereto (R. 314–315).

On October 8, 1962, the examiner rendered his decision (R. 315), awarding a license for High Mountain Sheep to Pacific Northwest. Treating the issue of federal development as an "additional issue raised

by the Secretary of the Interior's letter of June 28, 1962" (R. 327), he disposed of it on the ground that there "is no evidence in this record that Federal development will provide greater flood control, power benefits, fish passage, navigation or recreation; and there is substantial evidence to the contrary" (R. 440). He specified no evidence of record.

The Secretary petitioned the Commission for leave to intervene as a party in the proceeding and to file exceptions to the examiner's decision (R. 494–520). The Commission granted the petition to intervene "limited to filing of exceptions to the Presiding Examiner's decision and participation in such oral argument as might subsequently be ordered" (R. 521–523). The Secretary filed exceptions (R. 523–605) and participated in the oral argument before the Commission (R. 27–55), which on February 5, 1965, affirmed the examiner (R. 609). The Commission ruled that the "development of the HMS project should not be undertaken by the United States itself" (R. 672). It agreed with "the examiner that the record supports no reason why federal development should be superior," observing that "[w]hile we have extensive material before us on the position of the Secretary of the Interior, there is no evidence in the record presented by him to support his position" (R. 665). With respect to the public purposes (flood control, etc.) that High Mountain Sheep would serve, the Commission found "nothing in this record to indicate that [they] * * * will not be served as adequately under the license conditions as would be

the case under federal development" (R. 667). As for problems of hydroelectric coordination, the Commission stated (R. 667–668): "We agree that the Secretary (or any single operator) normally would have a superior ability to coordinate the operations of HMS with the other affected projects on the river. But there is no evidence upon which we can determine the scope or the seriousness of this matter in the context of a river system which already has a number of different project operators and an existing coordination system, i.e., the Northwest Power Pool."

The Commission stressed (as had the examiner, R. 440) that the Department of the Interior had "frankly admitted that it has no present intention of seeking authorization to commence construction or planning to construct an HMS project" (R. 668). The Commission concluded that "the delay inherent in federal construction * * * outweighs those benefits which Interior contends would result from federal construction (i.e., superior co-ordination and non-power benefits discussed above), assuming *arguendo,* that such benefits would be realized" (R. 669).

The Secretary petitioned for a rehearing. He asked that the record be reopened to permit him to repair the evidentiary deficiencies noted by the Commission in its opinion (R. 718–748). Rehearing (but not a reopening of the record) was granted (R. 773–774). On April 30, 1964, the Commission issued an opinion and order reaffirming its original decision save for some changes in the terms of the license (R. 780).

The Secretary (as well as Washington Public Power

Supply System) sought judicial review of the Commission's award of a license to Pacific Northwest. The Court of Appeals for the District of Columbia Circuit upheld the Commission's order (IV R. 373–387).[2] The court summarily rejected the Secretary's argument that the Commission "erred in failing to require an independent staff study and to permit the Secretary to offer evidence respecting federal development" (IV R. 386), observing (IV R. 387), "Suffice it to say that his long delay in opposing the grant to Pacific Northwest * * * was sufficient to warrant denial of his motion. * * * [T]he Secretary has no cause to complain that he was not permitted to intro-

[2] Washington Power, the competing license applicant, is the petitioner in No. 462. The issue it raised is whether, assuming any license should be awarded rather than the project reserved for federal development, it was entitled to the license over Pacific Northwest by virtue of Section 7(a) of the Federal Power Act, 16 U.S.C. 800(a). That section grants a preference to public agencies "where no preliminary permit has been issued" under Section 4(f), 16 U.S.C. 797(f). The application of the provision here depends on whether the preliminary permit issued to Pacific Northwest in 1955 embraced the High Mountain Sheep site. On that question—which is neither presented by the present appeal nor related to the issues herein—we intimate no view. Our silence on that issue is premised on our understanding, confirmed by the Commission (see R. 646–648, 793–795; Commission Br. in Opp., p. 34, n. 20), that a preliminary permit—whatever its reach may be for priority purposes—does not effect a withdrawal of federal lands (Federal Power Act, § 24, 16 U.S.C. 818) save to the extent those lands are specifically described in the permit. Section 24 provides that "[a]ny lands of the United States included in any proposed project under the provisions of this Part shall from the date of filing of application therefor be reserved from entry, location, or other disposal under the laws of the United States until

duce evidence which he has not proffered or described."

ARGUMENT

INTRODUCTION AND SUMMARY

Section 4(e) of the Federal Power Act, 16 U.S.C. 797(e), authorizes the Federal Power Commission to grant licenses to private power companies and non-federal public power enterprises to construct and develop, for their own use and benefit, hydroelectric projects utilizing the flow of navigable rivers or occupying federal lands or reservations. The normal term of such licenses is 50 years. This grant of authority to the Commission to alienate invaluable federal water resources is plainly an extraordinary one. To protect the national interest, Congress provided in Section 7(b) of the Act, 16 U.S.C. 800(b), that the Commission may not license a water resource that in its judgment should be developed by the federal government itself; in such a case the Commission is required by the statute to prepare and transmit to Congress an appropriate recommendation concerning federal development.

The burden of establishing entitlement to a hydroelectric license under the Federal Power Act is, of course, on the applicant, and we think it clear that

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otherwise directed by the Commission or by Congress," and it is essential to the orderly management of the federal government's vast landholdings that any application for a license or permit for the use of federal lands supply the Department of the Interior (or other custodian of federal lands) with particularized notice of the lands to be withdrawn, so that the Department may formulate its position on the application accordingly.

unless Section 7(b) is to be a dead letter the applicant for a license must show, as an essential element of his case, that licensing is a satisfactory alternative to federal development. If we are correct, the Commission cannot convey rights to a federal water resource where the record is silent on the relative merits of federal and non-federal development.

In this Court, counsel for the Commission concede the principle (Br. in Opp. 20). The heart of the controversy, therefore, is whether it was honored by the Commission in this proceeding. We think not. We stress the following points.

(1) Neither the applicants nor the Commission's staff introduced any evidence addressed to the issue of federal development. Ignored in the examiner's pre-hearing report, the question was not even noticed until after the evidentiary record was closed. Commission counsel have exhumed from the lengthy hearing record some fragments of evidence arguably relevant to the federal development issue, but this evidence was introduced for quite other purposes, and, so far as appears, was relied on by neither the examiner nor the Commission. In addition, as we show, it is plainly insufficient to support a reasoned judgment on the need for federal development.

(2) Repeatedly, after the hearings were closed, the Secretary of the Interior requested that the proceeding be reopened for further consideration whether the High Mountain Sheep project should be developed by the federal government. His submissions raised numerous factual issues on which the existing record was

completely silent. Yet, the Commission limited his participation to argument and refused to conduct any further evidentiary hearing. Doubtless the Commission enjoys a broad discretion in deciding whether to grant or deny reopening. But denial here had the effect of foreclosing any factual inquiry at all into the issue of federal development—and thus of awarding a license, not because the applicant proved that licensing was an adequate alternative to federal development, but because the Secretary of the Interior was not permitted to make a record on the issue.

(3) The Commission stated in its opinion that federal development of the High Mountain Sheep site was not required. This conclusion was based, however, not on evidence comparing the merits of federal and non-federal development—for there was none—but, avowedly, on the absence of evidence on the issue, and, to a lesser extent, on argumentative and extra-record materials whose insufficiency to take the place of a full evidentiary record is readily demonstrable. The Commission thus required the license opponents to prove that the license should not be granted. This procedure cannot, we submit, be reconciled with the agreed principle that an affirmative showing of the suitability of non-federal development is a necessary predicate to the issuance of a license under Section 4(e).

In our view, the conclusion is inescapable that the Commission in this case misconceived its duty under Section 7(b)—that it believed itself free to award a license in the absence of affirmative evidence of the

need for federal development. At most, the Commission gave the issue of federal development only perfunctory consideration. That might perhaps be excusable in a routine licensing case, but this case is far from routine.

The very nature of the High Mountain Sheep project poses the issue of federal development sharply. Unlike the typical hydroelectric project, the dam to be constructed at High Mountain Sheep will not only generate electrical power at the site, but also create a vast reservoir that will endow the project with capabilities far beyond those of the ordinary "run of the river" dam. By storing waters, and then releasing them at strategic intervals, the dam at High Mountain Sheep will regulate the flow of the river below it, thereby facilitating navigation, preventing flooding, combatting water pollution, protecting the salmon runs, and—not least—maximizing the power production of the downstream dams (all run-of-the-river projects) by maintaining the river at a level enabling them to utilize the river's flow most efficiently in their hydroelectric generation. The reservoir formed by the dam may also have important uses as a recreational facility and as a source of irrigation waters for the arid lands of the region.

Prima facie, the federal government is far more capable of performing these varied functions with maximum effectiveness than any licensee. It is not merely that functions like flood control, irrigation, water quality control and fish conservation are normally regarded as governmental; or that the down-

stream dams, whose power needs High Mountain Sheep will importantly serve, are—without exception—federally owned and operated. Perhaps the most important reason why federal development seems indicated here is the antagonism between at-site power production—the sole interest that a non-federal operator would have—and the special functions that a project like High Mountain Sheep can perform by virtue of being a major multiple-purpose storage dam. When stored waters are released for purposes other than power generation at the dam site itself—for example, to make room for anticipated flood waters, or to oxygenate the river for the protection of fish, or to enable a downstream dam to generate more electricity—the amount of water that remains for usable at-site power production is reduced. A power company would have a natural reluctance to relinquish its hydroelectric resources for purposes in which it has no economic stake, especially where, as here, the result would be directly to benefit a competitor, the Bonneville Power Administration of the Department of the Interior, which controls and markets the power output of all of the dams on the Snake and Columbia Rivers downstream from High Mountain Sheep.

To be sure, the license contains conditions intended to assure that the licensee will cooperate with the downstream federal complex and will assume the non-power functions of the project. But the adequacy of conditions as a substitute for direct federal control is questionable. There are limits on the

unremunerative obligations that can be imposed on a licensee without endangering the economic feasibility of the project. Moreover, we are dealing here with a license that has a term of 50 years, and it may be doubted whether any license—however skillfully drafted—can anticipate all of the problems that may arise during this period, or can provide the adaptability and flexibility necessary for optimum exploitation of a multi-purpose project of this kind. It may be questioned, too, whether any license can guarantee that hydroelectric coordination with the downstream dams will be as complete, or performance of the non-power functions of the project as wholehearted and effective, as would be the case were control lodged in the federal government, whose capabilities and active concerns span the entire range of functions that the project will serve. And should disputes over the licensee's obligations arise—as is likely in view of the conflict between the licensee's economic interests and the public purposes that it is required by the license to perform—resort must be had to the adjudicatory procedures of the Power Commission. These procedures are too slow to effect the speedy adjustments that are constantly necessary in the operation of a large multi-purpose storage dam.

In the light of these considerations one may question whether Congress, when it enacted the Federal Power Act in 1920, foresaw or intended the licensing of projects of the magnitude and complexity of High Mountain Sheep, so predominantly public in their purposes. We do not go so far. But we do insist

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that, in the circumstances, the sound development in the public interest of the nation's water resources requires a presumption in favor of federal ownership and operation of such a facility. At least, it seems plainly improper for the Commission to brush aside the acute problems posed by non-federal development of such a project without searching inquiry into the adequacy of the conditioning technique as an alternative to direct federal control.

It remains to review the proceedings before the Commission and to show that the Commission failed in its conceded duty to insist that a record be made showing the appropriateness of non-federal development before it issued any license. That is the burden of Point I of our argument (*infra*, pp. 16–29). In Point II (*infra*, pp. ~~29–42~~ 30–43) we demonstrate that the Commission's default is not harmless error in this case, since the very nature and circumstances of the High Mountain Sheep project forcefully attest the need for federal development.

I. THE REFUSAL OF THE COMMISSION TO RECOMMEND FEDERAL DEVELOPMENT OF HIGH MOUNTAIN SHEEP WAS BASED ON THE FAILURE OF THE RECORD AFFIRMATIVELY TO ESTABLISH A NEED FOR SUCH DEVELOPMENT

A.

The proceeding here arose from the competing applications of Pacific Northwest and Washington Power for a hydroelectric license, and hearings were held before a Commission examiner at which the applicants presented evidence in support of their respective applications. Although it is now conceded by

all that a license may not be issued without evidence showing the suitability of non-federal development, neither applicant introduced any evidence addressed to that question; nor did the Commission's staff or anyone else. The examiner's report on the pre-hearing conference (R. 263–277) does not mention federal development, and, not surprisingly, Section 7(b) was not alluded to during the lengthy hearings.

The issue was indeed wholly ignored until some months after the hearings were completed and the record closed, when the Secretary of the Interior wrote to the Commission advising that in his view High Mountain Sheep should be reserved for federal development (R. 309). The examiner made clear in his opinion that the issue of federal development had not been raised previously, describing it as an "additional issue raised by the Secretary of Interior's letter" (R. 327). Far from making a record in support of non-federal development, the parties were evidently unaware of their obligation to establish the consistency of the proposed license with Section 7(b) until the evidentiary record was closed. It was never reopened.[3]

This procedure, which the Commission condoned, cannot, we submit, be reconciled with its admitted obligation to satisfy itself affirmatively that licensing is a suitable alternative to federal development. Evidently, the opposite rule was followed here—that in the absence of evidence that non-federal develop-

[3] Save to admit the Secretary's letter—which had not been intended as evidence (see R. 430).

ment is unsuitable the license will issue. If the correct principle is that an applicant is not entitled to a license unless he establishes the suitability of non-federal development—and we emphasize again that this principle is conceded by Commission counsel—how, we may properly ask, may the applicant be granted a license though no evidence in support of the claim is proffered and though the issue is not even recognized to exist until the evidentiary phase of the proceeding has terminated?

It is true that once the existence of the issue was pressed on the Commission by the Secretary of the Interior, it was the subject of briefing and argument before the examiner and, on appeal, before the Commission. But no factual inquiry was undertaken. And while we suggest no rigid dichotomy between facts developed in an adversary hearing and those which may properly be presented in a brief or of which an administrative agency may take official notice, the extra-record materials relied on by the Commission and the examiner here, as we shall see, were manifestly no substitute for evidence.

In this Court, counsel for the Commission and for Pacific Northwest have cited portions of the hearing record as demonstrating the suitability of non-federal development. However, the evidence in question was not addressed to the issue of federal development, but to the question whether the license applications complied with the requirement of Section 10(a) of the Federal Power Act, 16 U.S.C. 803(a), that only a project "best adapted to a comprehensive plan" for

developing a waterway may be licensed. The issues are different. The High Mountain Sheep project, as outlined by the license applicants, may in its design be "best adapted to a comprehensive plan" for the development of the particular stretch of the Snake-Columbia river system;[4] indeed, any federal project at the site would doubtless be similar, if not identical, in its structure and in the immediate purposes it was designed to serve. But it is a separate question whether that project should be controlled and operated by the federal government rather than by a joint venture among private power companies or by an association of public utility districts. That is the nub of the issue under Section 7(b); it was, to repeat, overlooked in the hearings.

Not only was the evidence cited in this Court introduced by the parties for another purpose, but one searches the examiner's and Commission's opinions in vain for any indication that it was considered material to the question of federal development. Nor does it, in fact, support the propriety of non-federal development of High Mountain Sheep. A joint ex-

[4] Even here, the Commission may have adopted an unduly narrow focus. Of the three opinions written during the course of the proceedings before the Commission—the examiner's report of October 8, 1962 (R. 315–491), the Commission's opinion and order of February 5, 1964 (R. 609–717), and the Commission's opinion and order on rehearing of April 30, 1964 (R. 780–805)—only the examiner's report attempts to delineate the reach of the waterway that must be considered under Section 10(a). It points out (R. 449) that at a pre-hearing conference the parties had agreed on an 80-mile stretch in the middle area of the Snake River, between the China Gardens project and the Hells Canyon project, as the reach of the river with respect

hibit at R. 305–307 projects the increased power that will be generated at the downstream federal hydroelectric dams as a result of the operation of the High Mountain Sheep dam under three different assumptions—"ultimate integrated operation" (171,000 average kilowatts of prime energy); "coordinated operation" (60,000 average kilowatts of prime energy); and "with Canadian storage" (53,000 average kilowatts of prime energy).[8] "Ultimate integration" was described by one of Washington Power's witnesses as the ideal type of operation, in which High Mountain Sheep and all other resources in the Pacific Northwest would be operated as if under single ownership (R. 12–13; IV R. 182–196). If High Mountain Sheep were constructed by the federal government, that is how it and the downstream federal projects would be operated. On the other hand, "coordinated operation" was described by the same witness as a less desirable type of operation. And this was the type of

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to which "the respective alternative projects should be analyzed." Although the Commission uses some broad general language in both of its opinions—chiefly "this reach of the river"—no definition different from the examiner's decision is suggested, and in fact the examiner's definition is incorporated in a footnote of the February 5, 1964, opinion of the Commission (R. 621). It may be inferred, therefore, that the Commission was being guided by the examiner's definition, all the more so since it was based on the stipulation of the parties who participated in the presentation of testimony. Those parties were, of course, unconcerned with the federal installations or with basin development generally.

[8] The figures for operation "with Canadian storage" do not indicate whether they were computed on the assumption of "ultimate integrated operation" or "coordinated operation."

operation Pacific Northwest would provide, according to its witness, and that on condition that it received a proper share of the benefits (R. 6–7). No witness suggested that such coordination as would be possible under the license would be optimal in terms of the needs of the downstream federal dams.

The foregoing is all the record [6] contains that is relevant to the question whether High Mountain Sheep should be developed by the federal government. Admitted for other purposes, this evidence suggests, if anything, that from the standpoint of power production licensing High Mountain Sheep is not the optimum solution.

B.

The deficiency of the record on the issue of federal development is the more striking because the Commission was repeatedly advised that there was a substantial question of the suitability of non-federal development of High Mountain Sheep.

(1) In letters written to the Commission as early as November 21, 1960, and March 15, 1961—long before the evidentiary hearings in the license proceeding were completed—the Secretary of the Interior recommended that a license be withheld pending study of the impact of the project on the salmon runs (R. 126, 138). This should have alerted the parties and the examiner to the existence of a potential issue under Section 7(b).

[6] The other "evidence" bearing on federal development that respondents discuss is extra-record material, which we consider at pp. 27–28, 40–41, *infra*.

(2) Later, when the evidentiary record had been closed but before the examiner had rendered his decision, the Secretary again wrote to the Commission, this time specifically urging that the High Mountain Sheep project be reserved for federal development pursuant to Section 7(b), citing the impact the project would have on the varied and predominantly federal interests in the river system (R. 309). The record could readily have been reopened at this stage, yet it was not (see p. 17 and n. 3, *supra*). To be sure, the Secretary did not specifically request an evidentiary hearing on his contentions, but that should not have been necessary; the letter on its face raised serious factual issues. The Secretary alleged, for example, "that Federal ownership will allow a more precise and intimate coordination control in this area of the Snake River than any agreement with non-Federal entities". (R. 312) and that federal control would enable greater flexibility in meeting the varied needs—recreational, navigational, etc.—that the project would serve (R. 311–313). These allegations should have been tested and explored with the aid of expert testimony. Yet, no further evidentiary hearings were conducted.

(3) After the examiner had rendered his decision awarding a license to Pacific Northwest, the Secretary asked formal leave of the Commission to intervene as a party in the proceeding. In his lengthy petition (R. 494–520), the Secretary raised a number of fundamental factual issues with respect to the question of federal development—alleging, for exam-

ple, that non-federal development would "necessarily result in a less complete integration and coordination of the total facilities of the river, with a corresponding loss of benefits" (R. 499). The Commission declined to explore these issues in a further hearing, expressly limiting the Secretary's participation to the filing of exceptions to the examiner's decision and participation in oral argument before the Commission.

(4) When the Commission issued its opinion confirming the examiner's award of a license to Pacific Northwest and rejecting the Secretary's argument on behalf of federal development, largely on the ground that no evidence had been adduced in support of the contention (see pp. 24–26, *infra*), the Secretary promptly petitioned for a reopening of the proceeding to permit the evidentiary deficiencies noted in the Commission's opinion to be remedied (R. 718–748). The Commission issued a further opinion but refused to reopen the case (see R. 773–774, 800), thus declining the Secretary's offer to submit evidence showing, for example, that only federal control would enable proper accommodation to such future needs as flood control, navigation, fisheries, recreation and water supply and permit "future generations to use this multi-purpose resource in ways not now predictable" (R. 721); that voluntary agreement would not permit maximum coordination of High Mountain Sheep with the downstream federal dams (R. 722); that the coordination condition inserted by the Commission in the license "cures nothing" (R. 728); "that the only effective guarantee to the public that * * * [High

Mountain Sheep] would produce maximum power benefits to the region would be Federal development" (R. 732); and that a licensee would so operate High Mountain Sheep for flood control "as to maximize the burden on the Federal projects" (R. 742). None of these issues could be resolved on the existing record.

It is regrettable that the Secretary did not make this submission sooner; perhaps, too, he might have been more specific in his proffer of evidence. But that is beside the point. Concededly, the ultimate responsibility for the enforcement of Section 7(b) is the Commission's, not the Secretary's. Moreover, as we have stressed, a license applicant is not entitled to prevail unless the appropriateness of non-federal development is affirmatively established. Accordingly, in a case where the record is silent on the suitability of non-federal development—as it was here—the Commission could not, we submit, deny even a tardy request for an opportunity to show that federal development should be recommended. In doing so the Commission granted a license in the face of substantial doubts as to the suitability of non-federal development.

c.

When the Commission came to write its opinion, the Secretary was contending vigorously for federal development, but the record, as we have seen, was barren of evidence on the question. The Commission nevertheless awarded a license to Pacific Northwest. In our view, a fair reading of the Commission's opin-

ion (and of the examiner's as well) establishes that the federal development issue was disposed of on two grounds—first, and primarily, on the ground that the record was insufficient to establish a need for federal development; secondly on the basis of extra-record materials which, when analyzed, are seen to lack substantial probative significance.

The opinion is couched in language that leaves little doubt that the Commission principally based its refusal to recommend federal development on the lack of affirmative record support for such a recommendation. Thus, the Commission stated that "the record supports no reason why federal development should be superior to development by PNPC" (R. 665). It stressed that "there is no evidence in the record presented by him [the Secretary of the Interior] to support his position" (R. 665). While conceding that the Secretary "normally would have a superior ability to coordinate the operations of HMS with the other affected projects on the river," the Commission could find "no evidence upon which we can determine the scope or the seriousness of this matter in the context of a river system which already has a number of different project operators and an existing coordination system, i.e., the Northwest Power Pool" (R. 667–668). The Commission continued: "The record does not show that federal ownership is necessary to achieve this result or that proper co-ordination would not be achieved in the absence of federal development" (R. 668).

With regard to the non-power benefits which the Secretary had argued could best be developed through

federal control of the project, the Commission was content to observe that "there is nothing in this record to indicate that the purposes described above will not be served as adequately under the license conditions as would be the case under federal development" (R. 667). "In short," the Commission concluded, "on the basis of the record here, plus such information of which we can take official notice, there is little if anything which would persuade us that federal development of HMS was inherently superior to licensing it to PNPC" (R. 668). "Neither the record nor our general knowledge of the Columbia River System discloses any major benefits which would result from federal construction over that by PNPC" (R. 669).

The Commission's emphasis on what the record failed to show cannot be dismissed as inadvertent. For the record was indeed silent on the issue of federal development. Such affirmative analysis as the Commission's opinion contains, moreover, is neither based on nor an adequate substitute for evidence. Thus, to the contention that federal development of High Mountain Sheep was necessary to assure maximum utilization of the non-power resources of the project—such as navigation, flood control, fish protection, irrigation, recreation, and pollution control—the Commission answered only that the license would contain conditions requiring the licensee to perform these functions. This should have been the beginning, not the end, of the inquiry. The critical question was the adequacy of conditioning as an alternative to direct federal control. On this, the

record was completely silent, and the Commission could but observe that "there is nothing in this record to indicate that the purposes described above will not be served as adequately under the license conditions as would be the case under federal development" (R. 667).[7]

To the contention that federal development was necessary to ensure maximum hydroelectric coordination with the downstream dams, the Commission—going beyond the record—responded that both federal and non-federal hydroelectric projects in the Columbia River system are coordinated through voluntary agreement and that the record of cooperation among the parties is good. Assuming their validity, these observations are wide of the mark. It is one thing to say that there is coordination among differently owned power projects—as indeed there must be to assure a steady power supply to the region—and quite another to equate the coordination achievable through contractual arrangement among parties having diverse interests with that which a single operator could achieve. The equivalence of these different methods of coordination is not self-evident. Indeed, in an evidentiary hearing the Secretary of the Interior would attempt to show, citing the example of Brownlee on the upper Snake (see p. 40, *infra*), that efforts at agreement with non-federal storage dams

[7] The flood control and navigation conditions are discussed further in the Commission's opinion on rehearing (see R. 782–784). The focus of the discussion, however, is on the adequacy of the conditions as drafted rather than on the relative merits of federal development and license conditions as means to achieve the non-power benefits of the project.

in the region have not always been fruitful. High Mountain Sheep will, of course, be a major storage dam.

We shall have further occasion to consider this point (see pp. 40–41, *infra*). At this stage it is sufficient to note that the possibility of contractual coordination, like the use of the conditioning power of the Commission to compel a licensee to assume nonpower functions, poses, rather than answers, the question whether non-federal development of a particular project is suitable. That question can be answered only by a factual comparison of the efficacy of these alternative methods of promoting maximum utilization of the water resource, and that comparison was not attempted by the Commission here—was indeed precluded by the silence of the record on the subject.

We advert to a final aspect of the Commission's ruling on the issue of federal development—its statement that any benefits of federal development were in all events outweighed by the delay that it would entail, the Secretary of the Interior having indicated that he would not press for immediate construction of the High Mountain Sheep project. Since the benefits of federal development had not been assayed, the Commission, we submit, was in no position to weigh them against the factor of delay. Moreover, the Commission overstated the matter when it said that there was no "actual choice" between "federal construction now and non-federal construction now" (R. 668). If the Commission believed that there was a present need for

the power and federal construction was indicated, it could, and should, have so recommended to Congress, notwithstanding any disagreement it might have had with the Secretary as to when the power was needed. That is its duty under Section 7(b).

At all events, in this and other respects [8] the record before the Commission is now stale, a factor that in our view underscores the necessity for further consideration by the Commission of the issue of federal development. The Secretary, on the basis of new developments,[9] now agrees with the Commission that early construction of High Mountain Sheep is justified, and he is prepared to seek prompt authorization of a federal project from Congress, if, on remand, the Commission recommends federal development.

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[8] On January 18, 1966, the Senate passed the National Wild Rivers bill (S. 1446, 89th Cong., 2d Sess., 112 Cong Rec. (daily ed.) 500), and it was pending before the House of Representatives when the 89th Congress adjourned. The bill already has been reintroduced in the 90th Congress (S. 119, 90th Cong., 1st Sess.). If enacted, it would preserve the Salmon River, a tributary of the Snake just below High Mountain Sheep, in its natural state. This would affect the Commission's finding as to the economic feasibility of Pacific Northwest Power Company's plan of development of High Mountain Sheep, which assumed the receipt of revenues from a companion project to be constructed on the Salmon at Lower Canyon—a project the bill would preclude (R. 622, 626–627, 744).

[9] For example, there has been authorized and is now under construction an extra-high-voltage intertie between the Pacific Northwest and the Pacific Southwest which will open vast new markets for Bonneville power. Act of August 30, 1964, 78 Stat. 682, 689; see S. Rep. No. 1326, 88th Cong., 2d Sess., p. 37.

II. THE COMMISSION'S FAILURE TO REQUIRE THAT A RECORD BE MADE ON THE MERITS OF FEDERAL AS COMPARED WITH NON-FEDERAL DEVELOPMENT COMPELS REVERSAL, PARTICULARLY WHERE, AS HERE, THE VERY NATURE AND CIRCUMSTANCES OF THE PROJECT ESTABLISH A STRONG CASE FOR FEDERAL DEVELOPMENT

We have traced the treatment of the federal development issue in the Commission proceeding step by step, showing that the Commission failed—contrary to the mandate of Section 7(b)—to require as a precondition to licensing the High Mountain Sheep project an affirmative evidentiary demonstration of the suitability of non-federal development. This error requires that the decision below be reversed and the case returned to the Commission for further evidentiary hearings.

So saying, we are not merely seeking to vindicate a rule with respect to the burden of proof, for, at all events, this is not a case in which the Commission's default may be excused on the ground that no serious issue of federal development is involved and that a remand to the Commission is unlikely to produce new evidence or a different result. The nature, purposes and location of the High Mountain Sheep project *prima facie* indicate the relative unsuitability of non-federal development.

High Mountain Sheep is a steep gorge in the Snake River on the border of Idaho and Oregon. Two hundred miles downstream the Snake flows into the Columbia River. Three hundred miles from this confluence, after traversing the most populous and in-

dustrialized portions of Oregon, the Columbia empties into the Pacific Ocean near Portland. The Snake and the Columbia (especially the former) are swift running, steeply descending rivers—qualities which make them ideal for hydroelectric development—and on the Snake-Columbia waterway between High Mountain Sheep and the ocean eight hydroelectric dams have been built and another authorized; still others are planned.

The Snake and Columbia rivers have another characteristic: their levels vary considerably from time to time, chiefly on a seasonal basis. This both creates a danger of flooding and interferes with navigation on the rivers. (The waterway is navigable—and navigated—up to High Mountain Sheep and beyond.) The constant fluctuations in the river level also create problems for the hydroelectric dams below High Mountain Sheep. They are all run-of-the-river dams, substantially dependent on the flow of the river for their generating capacity. When the level of the river is low, their generation is reduced; when it is high, the generators cannot absorb the entire flow and the excess waters—wasted for hydroelectric generation—must be spilled through the dam's sluice gates.

The fluctuation of the river level has other important consequences. It affects the extensive use of the waterway for irrigation projects. It also affects pollution. The lower Columbia is used for the disposal of industrial wastes, and when the river level is high the wastes are diluted and the amount of pollution thus reduced.

Finally, important spawning grounds for salmon and steelhead trout, both major industries in the Pacific Northwest, are located on tributaries of the Columbia and Snake. The ability of the fish to survive the journey upstream to their spawning grounds depends on the river temperature remaining relatively low and the water well oxygenated. A steady supply of cooler, more highly oxygenated water from the mountainous upstream area is therefore critical to a successful salmon or steelhead trout run.

Regulating the river flow is thus a vital necessity. Its accomplishment depends on the existence of large storage dams—dams that do not merely utilize the normal river flow for hydroelectric generation but, in addition, form reservoirs to store huge volumes of water for the multiple purposes which that storage serves. High Mountain Sheep is the last remaining site on the Snake River suitable for a major storage dam, and whether the project is constructed by a licensee or by the federal government, all agree that it is such a dam that will be built. So clear is the need for additional storage capacity on the Snake that the Commission made plain from the outset that any dam at High Mountain Sheep which did not contain substantial storage capacity would not be best adapted to a comprehensive plan for developing the waterway as required by Section 10(a) of the Federal Power Act. Under the plans submitted by the license applicants and approved by the Commission, High Mountain Sheep will have a reservoir 58 miles long, giving it a storage capacity of two and one-quarter

million acre feet. This will make it one of the largest storage dams in the nation and will more than triple the storage capacity of the dams on the lower-Snake-Columbia waterway. The additional storage capacity could be of inestimable benefit to the people and industries of the Columbia-Snake river basin, if it is utilized effectively.

Properly timed releases of stored waters at High Mountain Sheep can assure the constant navigability of the Snake and Columbia Rivers, protect the salmon runs when the water downstream is too hot or insufficiently oxygenated, prevent undue pollution, increase the hydroelectric production of the downstream dams when the river level is too low for the generators to be operated at maximum capacity, and feed irrigation projects that depend on the waters of the Snake and Columbia rivers. The reservoir at High Mountain Sheep will also serve to catch and hold flood waters created by rainfall or melting snow, and so prevent damage to the cities, towns, ranches, farms and industries downstream on the banks of the Snake and Columbia rivers. In addition, like Lake Tahoe in Nevada and California and Jackson Lake in Wyoming (each substantially increased in volume by a dam), the reservoir may come to be an important recreational center. It may also some day serve directly as a source of irrigation of the arid lands of the region. Finally, the reservoir will constitute an important reserve of electrical energy. Rather than permit the river level to rise to a point where much of the flow cannot be utilized by the downstream run-

of-the-river dams but must be spilled, High Mountain Sheep will trap and hold the excess waters, both to generate at-site power when the river level downstream is too low for the dams there to produce sufficient power, and, as mentioned, to release the stored waters to the downstream dams for use in their own power generation.

There is another important function that High Mountain Sheep will serve—one that is at the root of the difficulties entailed by non-federal development—namely, at-site power production. A high dam with a vast reservoir behind it, High Mountain Sheep's own generators will have a very large hydroelectric potential. And at-site production is the only function of the dam in which a licensee would have any direct interest. Neither applicant owns any of the downstream dams—they are all federal—or has any stake in the fishing industry, in navigation, in flood control, in water-quality control, in irrigation or in recreation.

The willingness of a power company to shoulder non-power public purposes or to coordinate its operations with a network of federal power projects is at least open to question, as is the appropriateness of delegating such essentially federal tasks to a non-federal entity. It is not as if these functions additional to at-site power production could be performed without cost to the licensee. Typically they are antagonistic to at-site production. For example, to draw down the reservoir in order to make room for anticipated flood waters may mean that stored waters

that could be used to generate power must instead be spilled through the dam's sluice gates or used to generate power that is surplus to the owner's needs. This is true, indeed, any time a storage dam releases water for purposes other than generating usable power at the site—yet such releases are the essence of the regulating function that the dam performs. The conflict between self-interest and public responsibility is the more acute where, as here, one duty of the storage-dam operator would be to release waters, at the possible cost of his own productive capacity, to maximize the power production of a competitor—the federal government, which markets the power of all the dams downstream from High Mountain Sheep in competition with the member companies of Pacific Northwest.

In these circumstances, it seems unlikely that a licensee will discharge with enthusiasm the vital regulating tasks entrusted to it. To be sure, with luck it may be able to pass on the cost of performing these functions to its ratepayers in the form of higher rates. But its ability to do so is far from assured. Under principles of public utility regulation, the regulated company is not guaranteed a profit, but only the right to set a rate that will cover its costs and allow a fair return on investment. Whether such a rate can actually be maintained depends entirely on the rates of competitors and the costs of alternative sources of energy. A power company will normally be reluctant to incur non-power costs that may compel it to raise its rates and in consequence perhaps lose some of its customers.

We stress that the federal government has a present investment in the dams that will be regulated by High Mountain Sheep of more than $1.5 billion; that more federal dams downstream from High Mountain Sheep are projected; and that the public interest in the non-power functions of High Mountain Sheep—flood control, navigation, fish production, recreation, irrigation and pollution control—are incalculably great. To entrust such a resource to a company with a conflict of interest would appear, on the face of the matter, contrary to the purposes of Section 7(b).

It is true that the Federal Power Commission can and does require, as a condition of licensing a water resource, that the licensee undertake to perform functions besides the at-site production in which it is alone interested. But, as a substitute for federal control, the conditioning power has a number of deficiencies. There is, to begin with, an evident difference between a task voluntarily undertaken and one assumed under legal compulsion. The federal government, through the Department of the Interior, the Department of Agriculture, and the Army's Corps of Engineers, has an active concern with all of the functions that High Mountain Sheep is to serve. A power company—whose primary responsibility is to its stockholders rather than to the public—does not. One is entitled to doubt that the company will perform functions directly in conflict with its economic interest with all possible imagination, resourcefulness and dedication.

Not only is it unrealistic to expect a power company to discharge with optimal effectiveness, and in

the teeth of its economic self-interest, duties so traditionally public and federal as, for example, flood control and navigation; it seems wholly unrealistic to attribute to a private company the knowledge and experience required to balance the competing needs that a regulating dam is called upon to meet. For example, to release stored waters for navigational purposes may make the dam less able to satisfy the anticipated needs of the downstream dams for headwater benefits; to store waters for reserve electrical energy may permit pollution downstream to reach a high level. The arbitration of these competing claims on the regulating dam is a difficult and delicate task. Not a business judgment, it requires skills that a private power company is unlikely to have. One cannot be confident how well and fairly such a company would discharge this arbitral function when its own economic interest, at-site power production, is adverse to many of the needs that must be placed in the balance.

License conditions also lack flexibility and adaptability. However skillfully drafted, no license can anticipate and provide for all of the contingencies that may arise during its 50-year term. Conceivably, 25 years hence, when thermonuclear plants supply (as they may) most of the power needs of the Pacific Northwest, High Mountain Sheep's principal value from the standpoint of the public interest in sound resource development may be as a facility for recreation, irrigation or river regulation for other than power purposes, functions that may be inconsistent

with its continued use as a major source of hydroelectric power. It is difficult to imagine a license condition that would provide for such a contingency yet be acceptable to Pacific Northwest's bondholders. They cannot fairly be expected to finance this $200 million project without assurance that it will remain essentially a facility for at-site power production.[10]

Moreover, no license is so explicit and precise that questions of interpretation will not arise.[11] Potentiality for dispute is built into the license by reason of

[10] The inherent inflexibility of the conditioning technique is illustrated by the conditions imposed in the Pacific Northwest license. Article 47 (R. 678) provides that the licensee "shall, in order to secure maximum recreational benefits, make every reasonable effort to maintain the water surface of the High Mountain Sheep reservoir at the highest level practicable" during the summer—but only insofar as that is "consistent with the primary purposes of the reservoir to provide pondage for Licensee's daily, weekly, monthly or seasonal power requirements * * *." Article 48 requires the licensee, "within one year from the date of issuance of the license, [to] file with the Commission for approval its proposed recreational use plan for the project" (R. 678); there is no provision for imposing new plans at a later date over the 50 year period of the license. The navigation article (R. 680) sets a maximum on the amount of flow that the Corps of Engineers may demand to facilitate navigation. Doubtless such limits on the obligations that the licensee may be asked to assume during the life of the license are necessary to make the venture economically feasible from the standpoint of a company whose interest is in at-site power production. The Commission itself has so stressed. *Turlock Irrigation District*, 31 F.P.C. 510, affirmed, 345 F. 2d 917 (C.A. 9), certiorari denied, 382 U.S. 941. But such limits reduce the adaptability of the project to changed circumstances over the long period of the license.

[11] The coordination condition, Article 14 (R. 800), is illustrative. It provides for hydroelectric coordination of High Mountain Sheep "with such other power systems and in such

the conflict of interest between the licensee's private concern—at-site power production—and the public concerns that the license obligates the licensee to perform. To resolve any such dispute resort to the adjudicatory machinery of the Federal Power Commission is necessary. Inevitably this is a rather slow and cumbersome procedure, one ill-suited to the nigh-instantaneous decisions and adjustments that the operation of a regulating dam entails. Suppose, for example, that in the middle of one of the salmon runs the temperature of the river rises alarmingly, and federal or State conservation agencies (or the fishermen themselves) ask the operator of High Mountain Sheep to release (at a sacrifice to the dam's power production) the cooler waters that it stores. If the request is refused, an order by the Power Commission is unlikely to come in time to avert irreparable harm. The Commission is not an operating agency and does not maintain day-to-day surveillance of its licensees. Yet it is on a day-to-day—indeed an hour-to-hour—basis that the operations of a storage dam must be adjusted to the many needs it serves.

None of these shortcomings in the use of the conditioning technique was alluded to by the Commission. The efficacy of the technique was assumed

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manner * * * as the Commission may direct in the interest of maximizing power and other beneficial public uses of water resources, and on such conditions concerning the equitable sharing of benefits by the license as the Commission may order." A similar article led to protracted disputes, still unresolved, with the private operator of the only other major storage dam on the Snake River, Brownlee.

without discussion, no record on the question having been made.

The Commission placed heavy emphasis on the existence of a coordination agreement in the Pacific Northwest to which both federal and non-federal hydroelectric enterprises belong. But this agreement [12]—not of record—contains a number of significant limitations. To begin with, it is limited to power; it has no application to the non-power functions performed by storage dams. Secondly, Pacific Northwest Power Company, the licensee here, is not a party, albeit the agreement would permit it to join. It is perhaps significant in this connection that Idaho Power Company, at present the only non-federal power enterprise to control a major storage dam in the Columbia-Snake system (Brownlee), has refused to join the agreement because of an unresolved dispute with the Bonneville Administration over compensation for the headwater benefits that Brownlee provides the downstream federal dams. Thirdly, the coordination agreement is quite limited in what it seeks to accomplish. It does not even purport to provide for coordination of releases from storage dams on an hourly basis, although such coordination seems necessary for the optimal utilization of the region's hydroelectric resources in view of the wide hourly swings in the region's load (power demand). Finally, like the license itself, the agreement, while

[12] The Northwest Power Pool—the arrangement that was in effect when the Commission wrote its decision—has since been superseded by the Pacific Northwest Coordination Agreement, alluded to in the Commission's opinion on rehearing. Neither is in the record. We address our remarks to the new agreement, a copy of which has been lodged with the Clerk of the Court.

detailed, is not in every respect so specific as to be self-applying; there are thus areas of potential dispute. It does not, in short, effect full integration.

It is true, of course, that even if High Mountain Sheep were controlled by the Bonneville Administration, its operations would have to be coordinated with those of the non-federal dams in the region. But, were it federally developed, High Mountain Sheep could at least be fully integrated with the vast dam complex whose power is marketed by the Bonneville Administration throughout the Pacific Northwest. Such integration is especially important in view of the fact that all of the dams most immediately affected by High Mountain Sheep—those downstream from it on the Snake and Columbia Rivers—are part of the Bonneville system and that Bonneville already controls about 75 percent of the total storage capacity of the region.

There is another circumstance that argues strongly in favor of federal development of High Mountain Sheep. In 1950 the Corps of Engineers submitted a comprehensive plan for the development of the Columbia River basin. H. Doc. No. 531, 81st Cong., 2d Sess., Vol. 1, pp. 1–3, Vol. 4, pp. 1429, 1482, Vol. 6, p. 2509. The plan recommended (among other things) federal construction of (1) nine run-of-the-river dams downstream from High Mountain Sheep and (2) a regulating reservoir for the nine dams at Hells Canyon on the upper Snake. The nine dams were all authorized by Congress and have been or, in one case, will be constructed as federal projects

in accordance with the plan. Hells Canyon was later licensed for private development without adequate regulating facilities. See *National Hells Canyon Ass'n* v. *Federal Power Comm'n,* 237 F. 2d 777 (C.A.D.C.), certiorari denied, 353 U.S. 924. The Corps of Engineers and the Secretary of the Interior then recommended that the federal regulating dam be built (after further study) at High Mountain Sheep—the last suitable site. H. Doc. No. 403, 87th Cong., 2d Sess., Vol. 1, pp. iv, viii-ix, 260. Congressional authorization of the downstream federal projects may not have pre-empted the Commission's authority to license High Mountain Sheep for private development. Compare *Chapman* v. *Federal Power Comm'n,* 345 U.S. 153. But Congress appropriated vast sums for federal development of the Columbia River basin's hydroelectric resources in accordance with an overall plan that contemplated that the key structure in the system would also be federal. In this context the Commission should not have licensed non-federal development without a factual inquiry into whether it was a completely adequate alternative.

We do not argue that the case for federal development just outlined is conclusive. An evidentiary hearing would be required to determine its validity and weight. Yet, the danger that the licensing of High Mountain Sheep would be an unsuitable alternative to federal development has, we believe, been sufficiently demonstrated to underscore the high importance of adherence to the precept, recently articulated by the Second Circuit in a slightly different context,

that "the right of the public must receive active and affirmative protection at the hands of the Commission. * * * The Commission must see to it that the record is complete. The Commission has an affirmative duty to inquire into and consider all relevant facts." *Scenic Hudson Preservation Conference* v. *Federal Power Commission,* 354 F. 2d 608, 620, certiorari denied, 384 U.S. 941. Like the other independent regulatory agencies, the Federal Power Commission has been given vast public responsibilities to discharge under a broad mandate and subject to only limited judicial control. Determining the destiny of a national resource as valuable and manifold in its potential benefits as High Mountain Sheep is one of the most important decisions vested in the Commission. That it must be discharged with utmost care and scrupulous responsibility is self-evident.

CONCLUSION

The judgment below should be reversed and the case remanded with directions to set aside the order of the Federal Power Commission.

Respectfully submitted.

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FEBRUARY 1967

U.S. GOVERNMENT PRINTING OFFICE: 1967